

EQUITY IN CONTRACTING FOR WOMEN ACT OF 2000

SEPTEMBER 21, 2000.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. TALENT, from the Committee on Small Business,
submitted the following

R E P O R T

[To accompany H.R. 4897]

[Including cost estimate of the Congressional Budget Office]

The Committee on Small Business, to whom was referred the bill (H.R. 4897) to amend the Small Business Act to establish a program to provide Federal contracting assistance to small business concerns owned and controlled by women, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The purpose of H.R. 4897, the “Equity in Contracting for Women Act of 2000,” is to allow contracts, in industries historically underrepresented by women-owned small businesses, to be reserved for competition by women-owned small businesses. The bill mandates that contracting officers reserve any contract within certain limitations for competition solely by women owned businesses that are economically disadvantaged. Without this change, contracting officers do not have any mechanism to identify and award contracts to women-owned small businesses.

NEED FOR LEGISLATION

There are approximately nine million women-owned businesses according to the statistics of the United States Small Business Administration. Women-owned businesses employ over 27 million people and are a vital element in the unprecedented growth and productivity of the American economy. Nearly half of the businesses owned by women provide goods and services to the federal government according to the National Foundation for Women Business Owners.

From 1997 to 1999, the number of federal government contracts awarded to women decreased by more than 38 percent. So while the private sector was increasing the use of women-owned small businesses, the federal government utilization was decreasing.

Congress recognized the valuable contribution of women-owned businesses when it established a five percent procurement goal in the Federal Acquisition Streamlining Act of 1994 ("FASA"). However, data from the Federal Procurement Data System shows that the highest utilization of women-owned businesses was 2.47 percent in 1999—not even half of the statutory goal. The Committee finds that this simply is unacceptable.

The Committee has heard testimony concerning the reasons for the failure of the federal government to achieve the five percent goal. Contract bundling, or the consolidation of smaller contract requirements into larger contracts, makes it difficult for women-owned small businesses to file responsive bids to bundled solicitations. The federal government also is increasing the use of the Federal Supply Schedule which increases the efficiency for purchasing commercial off-the-shelf items. However, only 30 percent of the contractors on Federal Supply Schedules are small businesses and an even smaller amount are women-owned small businesses. Nothing in the Federal Supply Schedule contracting process mandates that a contracting officer select specific contractors for an award. Thus, being on the Federal Supply Schedule does not guarantee that the contractor will be used for the purchase of goods and services. The Federal Supply Schedule, while increasing the efficiency of government procurements for commercially-available items, also may perpetuate the use of well-known firms that are not women-owned businesses.

As the Committee has seen on numerous occasions, the drive for efficiency in procurement often places Congressionally-mandated contracting goals for small businesses in general, and women-owned businesses in particular, in jeopardy. Current procurement practices enable contracting officers to reserve competition among small businesses for contracts in value between \$2,500 and \$100,000 if the contracting officer finds that there will be at least two responsible small businesses to bid on the contract. The Committee believes that a similar mechanism should be established for women-owned small businesses in historically underrepresented industries. This would help contracting officers meet the procurement goal for women established in FASA while still ensuring that government receives the benefits of competitive bidding for goods and services.

The Committee believes that this action is necessary even though the President issued Executive Order 13,157 on May 23, 2000 affirming the Administration's goal of increasing opportunities for women-owned small businesses. The Executive order provides a mechanism by which the Small Business Administration and the Office of Federal Procurement Policy within the Office of Management and Budget can monitor and measure compliance with the women-owned procurement goal in FASA. The Executive Order also would authorize the collection and dissemination of best practices among agencies for achieving the procurement goal established in FASA. However, the Executive Order does not provide any tool by which contracting officers can identify and utilize

women-owned small businesses. The Committee believes that the goals expressed in FASA and reaffirmed in the Executive Order will not be achieved without the use of some mandatory tool which enables contracting officers to identify women-owned small businesses and establish competition among those businesses for the provision of goods and services to the federal government.

COMMITTEE ACTION

The Committee on Small Business held no separate hearings on H.R. 4897. During the 106th Congress, the committee regularly heard from women-owned businesses about their inability to obtain federal prime contracts. The issue also was a central focus of a June 8, 2000 hearing by the Subcommittee on Government Programs and Oversight entitled "Focus on Women's Business Enterprises." During that hearing, both the National Black Chamber of Commerce and the National Association of Women Business Owners expressed concern with the federal government's failure to meet the five percent goal set forth in FASA.

CONSIDERATION OF H.R. 4897

At 11:30 a.m. on July 27, 2000, the Committee on Small Business met to consider and report H.R. 4897. Following a brief opening statement by the Ranking Democratic Member, Ms. Velazquez, the Chairman declared the bill open for amendment. No amendments were offered. Chairman Talent then moved the bill be reported, and at 12:04 p.m., by unanimous voice vote, a quorum being present, the Committee passed H.R. 4897 and ordered it reported.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Designates the bill as the "Equity in Contracting for Women Act of 2000."

Section 2. Procurement program for womens's small business concerns

This section modifies section 8 of the Small Business Act by adding a new subsection (m) to establish a Procurement Program for Women's Small Business Concerns.

Paragraph (1) gives the same definition to a "contracting officer" as provided under the Office of Federal Procurement Policy Act.

Paragraph (1) also defines a "small business concern owned and controlled by women" as one that is at least 51 percent owned and controlled by women who are economically disadvantaged. The Committee intends that the Small Business Administration develop standards for the determination of economic disadvantage which are consistent with other Small Business Administration programs designed to assist "economically disadvantaged" small business concerns.

Paragraph (2) authorizes federal agencies to reserve any contract for competition by small business concerns owned and controlled by women if the following criteria are satisfied: (a) the firm is a responsible bidder; (b) the contracting officer expects that two or

more small business concerns owned and controlled by women will submit bids on the contract; (c) the contract is for the procurement of goods and services in an industry identified by the Administrator of the Small Business Administration as one in which small business concerns owned and controlled by women are historically underrepresented; (d) if the anticipated award amount of the contract does not exceed \$5,000,000 for a manufacturing business or \$3,000,000 for all other contracts; (e) if the contracting officer can anticipate that the award will be made at reasonable price; and (f) if the concern is certified as a small business concern owned and controlled by women.

The Committee intends that a certification by any federal, state or local governmental entity should satisfy this last criterion as long as the certification tracks the definition of small business concern owned and controlled by women as used in this Act. However, the Committee does not intend for the Administrator to establish a certification program for small business concerns owned and controlled by women.

In addition, the Committee expects that the contracting officers will accept self-certification so long as the documentation provided along with the response to the solicitation enables the contracting officer to determine that the bidder is a small business concern owned and controlled by women as used in this Act. The Committee expects that the Administrator will develop documentation standards that will be utilized by all contracting officers. For purposes of developing standards of documentation, the Committee does not expect that the Administrator should duplicate the documentation requirements for its 8(a) program. Nevertheless, the documentation should be sufficiently demanding so that a contracting officer can pierce the veil of various business enterprises to ensure that the bidder meets the definition set forth in this Act. Thus, the Committee expects that documentation would enable the contracting officer to apply attribution rules set forth in Title 13 of the Code of Federal Regulations to determine whether the bidder is a small business concern owned and controlled by women.

The Committee does not intend that the contracting program established in this Act provide a basis for contracting officers to award contracts on a sole-source basis to small business concerns owned and controlled by women. Rather, the Committee intends that contracting officers utilize the contracting mechanism established in this Act to identify small business concerns owned and controlled by women in industries in which they are historically represented as prime contractors and competitively bid those contracts. Ultimately, the Committee expects that the process for identifying these small business concerns owned and controlled by women will lead to greater utilization of small business concerns owned and controlled by women throughout the federal government and not just in contracts designated in this Act.

Paragraph (3) requires that the Administrator conduct a study in order to identify those industries in which small business concerns owned and controlled by women are underrepresented in obtaining federal contracts. The Committee expects the Administrator's study to focus on those industries in which small business concerns owned and controlled by women are underrepresented at the prime contractor level. The study shall evaluate, on an industry-by-indus-

try basis the specific industries and regions of the United States that are underrepresented. In order for the program established in this Act to conform with *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), the Committee expects that the Administrator's study will mirror the "benchmarking" study performed by the Department of Commerce for small disadvantaged businesses.

Paragraph 4 requires the Administrator to establish procedures for verifying the eligibility of businesses for the program established by this Act. The Committee reiterates its intent that the Act not be used by the Administrator to establish a certification program. Instead, the Committee expects the Administrator to develop regulations which will efficiently and rapidly resolve disputes over eligibility without unduly burdening small businesses.

Paragraph 4 also requires the Administrator to develop regulations by which the Small Business Administration can quickly and in a cost-effective manner verify the accuracy of any certification, such as, but not limited to, the development of lists of other federal, state, and local certifications that it will accept.

Paragraph 4 also authorizes, but does not mandate, the Administrator to provide for periodic examinations of the program including random program examinations in order to determine that respondents to solicitations are businesses eligible under this Act. The Committee expects that such examinations will not be intrusive but will be sufficient to determine that other governmental organizations are providing adequate certifications and that self-certification is not being abused. The Committee does not intend that these periodic or random examinations be transformed into an ongoing certification program.

Paragraph 4 also requires government agencies, including those specified in the Act, to provide information and assistance to the Administrator in order to carry out the purposes of the Act.

Paragraph also makes clear that small business concerns will be subject to penalties beyond those set forth in the Small Business Act should they misrepresent their status under this Act.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 18, 2000.

Hon. JAMES M. TALENT,
Chairman, Committee on Small Business,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4897, the Equity in Contracting for Women Act of 2000.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

H.R. 4897—Equity in Contracting for Women Act of 2000

CBO estimates that implementing H.R. 4897 would result in higher contracting costs for the federal government of several million dollars per year, subject to the availability of appropriated funds. Enactment of the bill also could affect direct spending and receipts, so pay-as-you-go procedures would apply. However, CBO estimates that any impact on direct spending and receipts would not be significant. H.R. 4897 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

H.R. 4897 would direct the Small Business Administration (SBA) to conduct a study to identify industries where small businesses owned and controlled by economically disadvantaged women are underrepresented with respect to receiving federal contracts. The bill would then permit federal contracting officers to set aside certain contracts involving those industries to be awarded to such small businesses. H.R. 4897 would require that each such contract be valued at no more than \$5 million, and be awarded at a fair and reasonable price.

Because H.R. 4897 would allow agencies to set aside certain contracts, the bill would likely restrict competition and increase the prices of some federal contracts. In fiscal year 1999, small businesses owned by economically disadvantaged women won 12,519 contracts under \$5 million each and worth a total of about \$1.8 billion (for an average contract value of \$145,000).

It is difficult to predict the number of contracts that would be affected by the bill and any consequent increase in price to the government. However, if H.R. 4897 were to result in a 5 percent increase in the number of contracts awarded to economically disadvantaged women and if the price of each contract would exceed the low bid by 5 percent, CBO estimates that the bill would cost the federal government close to \$5 million each year, subject to the availability of appropriated funds. That estimate assumes that contracts set aside under H.R. 4897 would have an average value of about \$145,000. In addition, based on information from SBA, CBO estimates that the study required by the bill would cost less than \$500,000 in fiscal year 2001.

Under H.R. 4897, persons who misrepresent their status as small business concerns owned and controlled by economically disadvantaged women would be subject to civil and criminal fines, so the federal government might collect additional fines if the bill is enacted. Collections of criminal fines are recorded in the budget as governmental receipts (revenues), which are deposited in the Crime Victims Fund and spent in subsequent years. Civil fines are recorded as governmental receipts. CBO expects that any additional receipts and direct spending would be negligible because of the small number of cases likely to be involved.

The CBO staff contact is Mark Grabowicz. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

COMMITTEE ESTIMATE OF COSTS

Pursuant to the Congressional Budget Act of 1974, the Committee estimates that the amendments to the Small Business Act contained in H.R. 4897 will not significantly increase discretionary spending over the next five fiscal years. The Committee also estimates that H.R. 4897 will not affect direct spending. These estimates concur with Congressional Budget Office (CBO) estimates.

Furthermore, pursuant to clause 3(d)(2)(A) of rule XIII of the Rules of the House of Representatives, the Committee estimates that implementation of H.R. 4897 will not significantly increase other administrative costs.

OVERSIGHT FINDINGS

In accordance with clause 4(c)(2) of rule X of the Rules of the House of Representatives, the Committee states that no oversight findings or recommendations have been made by the Committee on Government Reform with respect to the subject matter contained in H.R. 4897.

In accordance with clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the oversight findings and recommendations of the Committee on Small Business with respect to the subject matter contained in H.R. 4897 are incorporated into the descriptive portions of this report.

STATEMENT OF CONSTITUTIONAL AUTHORITY

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, Section 8, clause 18, of the Constitution of the United States.

COMPLIANCE WITH P.L. 104-4

H.R. 4897 contains no unfunded mandates.

CONGRESSIONAL ACCOUNTABILITY ACT

H.R. 4897 does not relate to the terms and conditions of employment or access to public services or accommodations with the meaning of section 102(b)(3) of P.L. 104-1.

FEDERAL ADVISORY COMMITTEE STATEMENT

This legislation does not establish or authorize the establishment of any new advisory committees.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in *italics* and existing law in which no change is proposed is shown in *roman*):

SECTION 8 OF THE SMALL BUSINESS ACT

SEC. 8. (a) * * *

* * * * *

(m) *PROCUREMENT PROGRAM FOR WOMEN'S SMALL BUSINESS CONCERNS.*—

(1) *DEFINITIONS.*—*In this subsection, the following definitions apply:*

(A) *CONTRACTING OFFICER.*—*The term “contracting officer” has the meaning given such term in section 27(f)(5) of the Office of Federal Procurement Policy Act (41 U.S.C. 423(f)(5)).*

(B) *SMALL BUSINESS CONCERN OWNED AND CONTROLLED BY WOMEN.*—*The term “small business concern owned and controlled by women” means any small business concern—*

(i) that is not less than 51 percent owned by 1 or more women who are economically disadvantaged; and

(ii) the management and daily business operations of which are controlled by 1 or more women.

(2) *AUTHORITY TO SET ASIDE CONTRACTS.*—*Notwithstanding any other provision of law and in accordance with this subsection, a contracting officer may set aside to be awarded only to a small business concern owned and controlled by women any contract for the procurement of goods or services by the Federal Government, if—*

(A) the concern is determined to be a responsible contractor with respect to the performance of such contract;

(B) the contracting officer has a reasonable expectation that 2 or more small business concerns owned and controlled by women will submit offers for the contract;

(C) the contract is for the procurement of goods or services with respect to an industry identified by the Administrator pursuant to paragraph (3);

(D) the anticipated award price of the contract (including options) does not exceed—

(i) \$5,000,000, in the case of a contract assigned a standard industrial classification code for manufacturing; or

(ii) \$3,000,000, in the case of all other contracts;

(E) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price; and

(F) the concern—

(i) is certified as a small business concern owned and controlled by women by a Federal agency or by a State or local government; or

(ii) certifies to the contracting officer that it is a small business concern owned and controlled by women and provides adequate documentation, in accordance with standards established by the Administration, to support such certification.

(3) *IDENTIFICATION OF INDUSTRIES.*—*The Administrator shall conduct a study to identify industries in which small business concerns owned and controlled by women are underrepresented with respect to Federal procurement contracting.*

(4) *ENFORCEMENT; PENALTIES.*—

(A) *VERIFICATION OF ELIGIBILITY.*—*In carrying out this subsection, the Administrator shall establish procedures relating to—*

(i) the filing, investigation, and disposition by the Administration of any challenge to the eligibility of a small business concern to receive assistance under this subsection (including a challenge, filed by an interested party, relating to the veracity of a certification made or information provided to the Administration by a small business concern under paragraph (2)(F)); and

(ii) verification by the Administrator of the accuracy of any certification made or information provided to the Administration by a small business concern under paragraph (2)(F).

(B) *EXAMINATIONS.*—*The procedures established under subparagraph (A) may provide for program examinations (including random program examinations) by the Administrator of any small business concern making a certification or providing information to the Administrator under paragraph (2)(F).*

(C) *PROVISION OF DATA.*—*Upon the request of the Administrator, the Secretary of Labor, the Secretary of Housing and Urban Development, and the Secretary of the Interior (or the Assistant Secretary for Indian Affairs), shall promptly provide to the Administrator such information as the Administrator determines to be necessary to carry out this subsection.*

(D) *PENALTIES.*—*In addition to the penalties described in section 16(d), any small business concern that is determined by the Administrator to have misrepresented the status of that concern as a small business concern owned and controlled by women for purposes of this subsection, shall be subject to—*

(i) section 1001 of title 18, United States Code; and

(ii) sections 3729 through 3733 of title 31, United States Code.